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No. 09-1188

IN THE

Supreme Court of the United States

FRANK A. SKINNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE and BUREAU OF PRISONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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Petitioner Frank A. Skinner respectfully files this reply in support of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

ARGUMENT

A. The Conflict Among the Circuits on the Question Presented Is Deep and Mature

In its brief in opposition, the government does not contest that there is a conflict among the Circuits on the question presented -- namely, whether a prisoner may bring a civil damages action, or is instead limited to habeas, to challenge non-durational harms in mixed sanctions cases. Mixed sanctions cases are those in which a prison disciplinary proceeding leads both to durational harms, such as the loss of good-time credits, and to non-durational harms, such as placement in segregation or the loss of prison privileges. Skinner has sought to bring a damages claim under the Privacy Act, 5 U.S.C. § 552a, to challenge segregation and loss of visitation and commissary privileges resulting from a disciplinary proceeding that also led to the loss of good-time credits. The government concedes that the Second Circuit would allow Skinner to bring his civil action so long as he renounced any right to dispute the loss of good-time credits, *see Peralta v. Vasquez*, 467 F.3d 98, 100-03 (2d Cir. 2006), but that the D.C. Circuit in this case oppositely found his civil action to be barred absent success in a habeas proceeding. *See* Pet. App. 14a-15a.

Rather than disputing the existence of a Circuit conflict, the government merely asserts that the Circuit

split is "limited and of recent vintage." U.S. Opp. at 12. Even if that were true, the conflict at this juncture would be clear and irreconcilable. Both Judge Calabresi's opinion for the Second Circuit in *Peralta* and Judge Garland's opinion for the D.C. Circuit here address the mixed sanctions question head-on and with thorough analysis; yet, the opinions diverge widely. Under these circumstances, there is no reason to expect the Circuit conflict to wane, and this Court should grant the petition to resolve the split.

In any event, the split among the Circuits is far deeper than the government surmises. For one thing, the government agrees with Skinner that the Eighth Circuit sides with the D.C. Circuit in holding that a prisoner may not pursue civil claims for non-durational harms in mixed sanctions cases. *See* U.S. Opp. at 12; Pet. at 13. Accordingly, even under the government's view of things, there has been a split between the Eighth and the Second Circuits on the question presented since at least 2006, when the Second Circuit in *Peralta* allowed the prisoner there to proceed civilly to challenge the non-durational punishment. And *Peralta* has plainly gained support in the district courts over the past several years. *See, e.g.*, *Brown v. Marshall*, No. CIV S-07-0956-MCE-DAD-P, 2009 U.S. Dist. LEXIS 86176, at *2-5 (E.D. Cal. Sept. 4, 2009); *Pollard v. Romero*, No. 07-cv-00399-EWN-KLM, 2008 U.S. Dist. LEXIS 33404, at *17-20 (D. Colo. Apr. 23, 2008); *see also, e.g.*, *Scott v. Nichols*, No. 9:10-CV-0230, 2010 U.S. Dist. LEXIS 49561, at *1-2 (N.D.N.Y. May 19, 2010); *Phelan v. Hersh*, No. 9:10-CV-0011, 2010 U.S. Dist. LEXIS 4252, at *9-10 (N.D.N.Y. Jan. 20, 2010). Thus, just considering the Circuits that *the government* concedes to have

reached the mixed sanctions question, a mature conflict exists: There is solid support at this time for the Second Circuit's position, as well as added support -- now with the D.C. Circuit's holding here -- for the view inaugurated by the Eighth Circuit.

Moreover, the Seventh and Eleventh Circuits have adopted positions more lenient to prisoner rights in mixed sanctions cases than even the Second Circuit. That sets up a Circuit conflict whereby the Eighth and D.C. Circuits categorically prohibit civil remedies in mixed sanctions cases, the Second Circuit adopts a hybrid approach (*i.e.*, permitting a prisoner to proceed with civil remedies as to non-durational harms, if the prisoner relinquishes the right subsequently to challenge durational harms), and the Seventh and Eleventh Circuits readily authorize the prisoner to proceed in a challenge to non-durational aspects. *See* Pet. at 18. The Seventh Circuit in *Viens v. Daniels*, 871 F.2d 1328 (7th Cir. 1989), held that a prisoner can challenge non-durational sanctions in a mixed sanctions case (even without renouncing relief with respect to durational harms), at least if the non-durational punishments are "substantial." *Id.* at 1334; *accord id.* at 1336 (Ripple, J., concurring). The Eleventh Circuit, without any qualification, has permitted prisoners to proceed with claims involving non-durational punishments in mixed sanctions cases. *See Gwin v. Snow*, 870 F.2d 616, 618-19, 624 (11th Cir. 1989).

The government says that *Viens* and *Gwin* are no longer good law in their respective Circuits. *See* U.S. Opp. at 11 & n.*. As to the Seventh Circuit, the government first claims that *Evans v. McBride*, 94 F.3d 1062 (7th Cir. 1996), upended *Viens*. But *Evans* ad-

dressed only a portion of *Viens* (dictum in *Viens*, even) discussing whether positing a claim as *one for damages* is, alone, sufficient to avoid habeas; *Evans* did not raise any issue about proceeding civilly when a prison disciplinary proceeding results in mixed sanctions. *See Viens*, 871 F.2d at 1332, 1333 (court noting that it "need not resolve" whether the form of "*relief* sought" allowed for Viens's civil claim, because of the alternate ground that Viens was suing in a mixed sanctions case) (emphasis in original).

The government's more substantial point on *Viens* is that the decision seemingly is irreconcilable with *Montgomery v. Anderson*, 262 F.3d 641 (7th Cir. 2001). In *Montgomery*, in a three-sentence passage that does not reference the thorough analysis in *Viens*, the court held that a prisoner must proceed via habeas where the punishment included both the loss of good-time credits and a reduction in "credit-earning class." *Id.* at 644. The government seizes on that passage from *Montgomery* as an implicit indication that the Seventh Circuit saw *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997), as overruling *Viens*. *See* U.S. Opp. at 11-12 n.*.

The government, however, reads too much into *Montgomery*, for, even before *Viens*, the Seventh Circuit presciently had adopted what would become *Heck*'s and *Balisok*'s rule that a prisoner's civil claim is barred if it would *necessarily imply* the invalidity of the fact or duration of confinement. *See Viens*, 871 F.2d at 1332 (citing *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986), and *Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986)). If the Seventh Circuit adopted the approach it did in *Viens* against the backdrop of existing Circuit

precedent comparable to the subsequent decisions in *Heck* and *Balisok*, it makes no sense to argue, as the government does, that the Seventh Circuit later must have meant to abrogate *Viens* (and even do so *sub silentio*) because of *Heck* and *Balisok*. Instead, *Montgomery* is best treated as an uninformed decision that, under governing Circuit rules, cannot overrule prior precedent to the contrary. *See* Pet. at 17 n.1; *cf.* Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 Duke L.J. 1, 33 & n.126 (Oct. 2008) [hereinafter "King & Sherry"] (describing *Montgomery* as a decision containing "little discussion" and whose "basis . . . is not entirely clear").[1]

The government's dismissal of the Eleventh Circuit's *Gwin* holding is much more easily cast aside. According to the government, the Eleventh Circuit -- also *sub silentio* -- overruled *Gwin* when it rehearsed *Heck*'s holding in *Uboh v. Reno*, 141 F.3d 1000, 1006 (11th Cir. 1998). *Uboh*, however, involved no question regarding mixed sanctions, or any non-durational punishment at all. Indeed, *Uboh* does little more than

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[1] Conceivably, to be charitable to *Montgomery*, a subsequent panel of the Seventh Circuit might seek to reconcile the decision with *Viens*. *Viens* mandates that the non-durational punishment imposed in a mixed sanctions case must be substantial to survive habeas, and arguably the non-durational harm in *Montgomery* was not substantial (or at least not as substantial or as important to the prisoner as the loss of good-time credits). Under that reading, *Montgomery* and *Viens* both remain good law, and the Seventh Circuit would continue to add to the complexity of the existing Circuit split.

state the unremarkable proposition that *Heck* precludes a prisoner from challenging in a civil action, rather than through habeas, "the validity and justification of the criminal proceedings" resulting in his conviction. *Uboh*, 141 F.3d at 1006.

In sum, there is a mature, complex Circuit split on the question presented. At least five Circuits have spoken on the issue, and they have adopted several divergent approaches. The Court should grant the petition to resolve the conflict.[2]

B. The Court of Appeals' Decision Is in Tension with This Court's Decisions

The government disputes Skinner's assertion that the decision below conflicts with this Court's precedents. At the outset, the government does recognize that dictum in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), is on point and supportive of Skinner's position. On this score, *Preiser* straightforwardly states: "If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confine-

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[2] The government contends that the Ninth Circuit, like the Eighth and D.C. Circuits, has demanded that a prisoner proceed exclusively in habeas to challenge non-durational harms in mixed sanctions cases. *See* U.S. Opp. at 12 (citing *Gotcher v. Wood*, 122 F.3d 39 (9th Cir. 1997)). The government's view is not shared by courts within the Ninth Circuit. *See Brown v. Marshall*, 2009 U.S. Dist. LEXIS 86176, at *2-5 (following *Peralta*). In any case, if *Gotcher* can be seen as aligned with the Eighth Circuit's and D.C. Circuit's view of habeas's exclusivity in mixed sanctions cases, then the decision only further deepens the Circuit split to involve six Circuits (the Second, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits) rather than five.

ment," the exclusivity of habeas for the claims challenging the latter "in no way precludes him from simultaneously litigating in federal court, under [42 U.S.C.] § 1983, his claim relating to the conditions of his confinement." *Id.* at 499 n.14. Notably, *Preiser*'s statement was joined by all nine Justices in the case. *See id.*; *see also id.* at 510 (Brennan, J., dissenting).

Nonetheless, the government dismisses *Preiser*'s teaching not just as dictum but as supposedly disavowed -- still again *sub silentio* -- by *Heck* and *Balisok*. *Heck* and *Balisok* were not mixed sanctions cases, and neither speaks at all about the rules to be applied in a mixed sanctions situation. Moreover, to assert conclusorily that *Heck* and its progeny decide the mixed sanctions issue begs the question presented, which is at its core whether the Court's current jurisprudence does or does not authorize a civil suit in mixed sanctions circumstances. Further, the government's position that *Heck* and *Balisok* so readily refute *Preiser*'s unanimous statement contradicts the courts and commentators who have emphasized that the Court's decisions have "left open" the issue of habeas's exclusivity in the mixed sanctions setting. *Peralta*, 467 F.3d at 103; *accord Pollard*, 2008 U.S. Dist. LEXIS 33404, at *18; King & Sherry, 58 Duke L. J. at 33.

The government also contests that the D.C. Circuit's decision is in tension with *Wolff v. McDonnell*, 418 U.S. 539 (1974). The government says that Skinner's analogy to *Wolff* impermissibly draws the Court into a "factbound question" as to how to read his pleadings. U.S. Opp. at 10. But Skinner does not petition this Court, and invoke *Wolff*, to correct a misconstruction of his factual allegations. Rather, Skinner's point is that

this Court previously has -- in *Wolff* -- permitted a prisoner to proceed with civil claims on the part of his case not necessarily impacting the duration of his confinement while, at the same time, finding the part affecting the duration of confinement barred by habeas. In this case, just as in *Wolff*, the complaint's allegations potentially can be construed not as a challenge to "a biased hearing officer" (*Balisok*, 520 U.S. at 647 (interpreting *Wolff*)), which would necessarily undermine the hearing officer's findings on both durational and non-duration punishment, but as a challenge to prison officials who prepared the record for the hearing officer. Skinner contends that, if that record-keeping infirmity were corrected, the hearing officer conceivably could have imposed the durational punishment, but not the more serious non-durational segregation and loss of privileges. *See* Pet. at 21-22.

C. The Question Presented Is Important and Warrants the Court's Review

The government minimizes the importance of clarifying whether and to what extent a prisoner can sue to challenge non-durational harm in a mixed sanctions case. The government's position flies in the face of what Justices and commentators alike previously have said, what state governments previously have asserted, the high regard this Court always has shown for resolving disputed issues concerning habeas's exclusivity, and the critical importance of the question presented to prisoners and to lower courts adjudicating prisoner cases.

Justices of this Court previously have urged the Court to resolve the question whether prisoners must proceed exclusively in habeas when their civil claims

"include challenges to the conditions, as well as to the length or duration, of confinement." *Bressman v. Farrier*, 498 U.S. 1126, 1128 (1991) (White & O'Connor, J.J., dissenting from denial of certiorari); *accord Preiser*, 411 U.S. at 508 (Brennan, J., dissenting). That the Court has, in the meantime, issued *Heck* and other decisions further clouding the picture (from a backdrop of straightforward instruction in *Preiser* favorable to the prisoner's civil action on non-durational harm, to a situation where the court of appeals below thought *Heck* might require a different result) only adds to the cert-worthiness of this case. Similarly, commentators have suggested that the Court should resolve "the problem of mixed claims." King & Sherry, 58 Duke L. J. at 33.

In addition, states have also categorized the mixed sanctions question as an important one warranting this Court's consideration. Though the (federal) government here attempts to use the denial of certiorari in *Peralta* in its favor, the *Peralta* proceedings in this Court, if anything, support granting Skinner's petition. In *Peralta*, it was officials of the State of New York that petitioned for certiorari, asserting that "there is a stark conflict among the circuits on a question that has wide impact on the litigation of prisoner claims in the federal courts." *Jones v. Peralta*, No. 06-1307 (U.S.), Pet. at 10. With another Circuit (*i.e.*, the D.C. Circuit) now having weighed in, and *Peralta* gaining still further support among lower courts (*see supra* p. 2), the plea of the state officials in *Peralta* currently has even greater resonance. After all, the vast majority of situa-

tions involving mixed sanctions arise in the state prisoner setting (via 42 U.S.C. § 1983).[3]

Next, the government's dismissal of the question presented as unimportant cannot be reconciled with this Court's historic concern for delineating the proper respective domains for prisoner civil claims and habeas. In just the past sixteen years, the Court has issued four decisions addressing the scope of habeas's exclusivity. *Wilkinson v. Dotson*, 544 U.S. 74 (2005); *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam); *Balisok*, *supra*; *Heck*, *supra*. And this Term, the Court will hear another case testing the boundaries of habeas's exclusivity. *Skinner v. Switzer*, No. 09-9000 (U.S.) (petition granted on May 24, 2010; oral argument scheduled for Oct. 13, 2010).

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[3] Skinner's case, of course, raises claims against federal entities, and the government insists that his petition's aim at federal officials should not give it any added significance. *See* U.S. Opp. at 8. In the petition, Skinner noted that the D.C. Circuit has given habeas's exclusivity a wider scope in federal settings than in state settings; Skinner further noted that, though this distinction did not directly figure into the D.C. Circuit's decision here, it potentially could arise in any review in this Court. *See* Pet. at 23-24, 27. Thus, granting the Petition could provide the added benefit of allowing the Court to address (for the first time) the standards for channeling litigation against federal officials through habeas, an issue that has already resulted in disagreement within the D.C. Circuit itself. Skinner's assertion is that, through the vehicle of this case, which otherwise is already cert-worthy, the Court may be able to stave off a growing dispute over habeas's exclusivity in the area of prisoner claims against the federal government.

Nor does the government anywhere acknowledge the significance of the question presented to the prison population or to lower courts faced with large volumes of prisoner litigation. Currently, prisoners, who oftentimes are without counsel, are faced with litigating the preliminary question of the appropriate forum and format in which to bring their dispute in every instance where they challenge a disciplinary proceeding that resulted in durational and non-durational punishment; and federal courts with already busy dockets must wade through that preliminary matter in such cases. A clear rule regarding mixed sanctions cases would help streamline prisoner litigation, for the benefit of prisoners and courts, and even prison litigation officials faced with defending the litigation.

Finally, the government -- conspicuously -- never addresses the prospect, recognized by Justices of this Court and by the Circuits, that the rule favoring habeas's exclusivity in a case like Skinner's "would create the incentive to include as part of every instance of prisoner punishment a sanction . . . affect[ing] the duration of the prisoner's sentence -- even if it would just be the loss of one day's worth of good-time credit." *Peralta*, 467 F.3d at 106 n.8; *accord Preiser*, 411 U.S. at 508-09 (Brennan, J., dissenting); *Viens*, 871 F.2d at 1333. In light of the "unfortunate incentives" engendered by the D.C. Circuit's decision (*Peralta*, 467 F.3d at 106 n.8), as well as the Circuit split that the decision deepens and the decision's tension with *Preiser* and *Wolff*, the Court should grant the petition and afford plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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